92-79

No. _____

FILED
JUL 9 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GABE KAIMOWITZ,

Petitioner,

—v.—

BILL FREDERICK, THE *ORLANDO TIMES*,
DR. CALVIN COLLINS, LOTTIE COLLINS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MORTON STAVIS
GEORGE COCHRAN
Center for Constitutional Rights
666 Broadway
Seventh Floor
New York, New York 10012
(212) 614-6427

JEFFREY W. STEMPEL*
Brooklyn Law School
250 Joralemon Street
Brooklyn, New York 11201
(718) 780-7953

**Counsel of Record*

41

QUESTIONS PRESENTED

1. Consistent with either Federal Rule of Civil Procedure 11 or 42 U.S.C. §1988, may a court deem a case both factually and legally frivolous and impose substantial monetary sanctions where the same court also denied a motion to dismiss, repeatedly denied summary judgment, and denied directed verdict in the case and where neither plaintiff nor counsel misrepresented the nature of the factual and legal matter to be set forth at trial?

2. In applying Fed. R. Civ. P. 11, may a district judge award substantial sanctions without first considering whether the substantial monetary award imposed constitutes the least severe sanction effective to accomplish the purposes of Rule 11?

3. In assessing Rule 11 sanctions, may the trial court impose upon the offending party collateral costs of judicial administration, such as juror fees?

4. May a district judge who has previously disqualified himself in cases involving an individual, because of personal bias toward that person, later adjudicate and award substantial sanctions in a case where the individual is a named plaintiff without violating 28 U.S.C. §§144, 455(a) and 455(b)(1)?

PARTIES

The parties to the proceedings are petitioner Gabe Kaimowitz and respondents Bill Frederick (both individually and as Mayor of Orlando, Florida), The Orlando Times, and the owners of the Times, Dr. Calvin Collins and Lottie Collins.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 2

STATUTES AND RULES INVOLVED 2

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 7

I. There Exists A Sharp Division in the Circuits Regarding Whether a Claim That Has Survived Pretrial Dismissal Motions and Received a Full Scale Trial Can Be Frivolous for Purposes of Rule 11 Where Counsel Has Never Misrepresented the Factual or Legal Matter To Be Presented at Trial 7

II. The Circuits Are Also In Sharp Conflict Regarding Whether to Adopt the "Least Severe Sanction" Test for Reviewing Rule 11 Sanctions 13

III. There Exists a Conflict in the Circuits Regarding Whether The Collateral Costs of Judicial Administration, Such As Juror Fees, May Be Awarded As A Rule 11 Sanction 15

IV. The Erratic Recusal Practice of the District Judge Conflicts with the Decisions of This Court in a Matter of Fundamental Importance -- The Integrity of the Judicial System 16

CONCLUSION 18

APPENDIX

Judgment of the United States Court of Appeals for the Eleventh Circuit, Denial of Rehearing en banc 1a

Order of the United States Court of Appeals for the Eleventh Circuit, Affirming District Court Judgment 3a

Judgment of the United States District Court Middle District of Florida 5a

TABLE OF AUTHORITIES

Page

Statutes:

28 U.S.C. §144 ..... 5, 17

28 U.S.C. §455 ..... 5, 16-18

42 U.S.C. §1988 (1988) 8

Rules:

Fed. R. Civ. P. 11 ..... passim

Cases:

Aetna Life Insurance Co. v. Lavoie,
475 U.S. 813, 106 S. Ct. 1580, 89 L. Ed. 2d 823 (1986) ... 17

Akin v. Q-L Investments, Inc.,
959 F.2d 521 (5th Cir. 1992). 13, 14

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) ... 8

Associated Indem. Corp. v. Fairchild Indus., Inc.,
961 F.2d 32 (2d Cir. 1992) 8

Avirgan v. Hull,
932 F.2d 1572 (11th Cir. 1991), cert. denied,
__U.S.__, 112 S. Ct. 913 (1992) 14

Barrios v. Pelham Marine, Inc.,

796 F.2d 128 (5th Cir. 1986) 10

Berger v. United States,
255 U.S. 22, 41 S. Ct. 230, 65 L Ed. 481 (1921) 17

Blue v. U.S. Dept. of Army, 914 F.2d 525 (4th Cir. 1990),
cert. denied sub nom, Chambers v. U.S. Dept. of Army,
_ U.S. _, 111 S. Ct. 1580, 113 L. Ed. 2d 645 (1991) 15

Brown v. Federation of State Medical Bds.,
830 F.2d 1429 (7th Cir. 1987) 13

Business Guides v. Chromatic Communications Enterprises,
Inc., ___U.S.___, 111 S. Ct. 922, 112 L. Ed. 2d 1140 (1991) 11, 15

Cabell v. Petty,
810 F.2d 463 (4th Cir. 1987) 13

Christiansburg Garment Co. v. EEOC,
434 U.S. 412, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978) 11

Committee of Organized Groups (COG) v. City of Orlando,Fla.,
Case No. 88-962-CIV-ORL-18 (Oct. 31, 1988) 5

Cooter & Gell v. Hartmarx Corp.,
496 U.S. 384, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990) . . 15

Crawford Fitting Co. v. J.T. Gibbons, Inc.,
482 U.S. 437, 107 S. Ct. 2494, 96 L. Ed. 2d 385 (1987) . . . 15

Danvers v. Danvers,
959 F.2d 601 (6th Cir. 1992) 13, 14

Gaiardo v. Ethyl Corp.,
835 F.2d 479 (3rd Cir. 1987) 8

Greenberg v. Hilton Int'l Co.,
870 F.2d 926 (2d Cir. 1989) 9

Healey v. Chelsea Resources, Ltd.,
947 F.2d 611 (2d Cir. 1991) 9

Hilton Hotels Corp. v. Banov,
899 F.2d 40 (D.C. Cir. 1990) 13

Hughes v. Rowe,
449 U.S. 5, 101 S. Ct. 173, 66 L. Ed. 2d 163 (1980) 11

Jennings v. Joshua Independent School Dist.,
877 F.2d 313 (5th Cir. 1989), cert. denied,
496 U.S. 935, 110 S. Ct. 3212 110 L. Ed. 2d 600
(1990) modified, 948 F.2d 194 (1991), cert. denied,
__ U.S. __, 60 U.S.L.W. 3815 (June 1, 1992) 10

Jones v. Texas Tech University,
656 F.2d 1137 (5th Cir. 1981) 11

Kaimowitz v. Florida Bar,
Civ. No. 88-835-CIV-ORL-18 (Sept. 22, 1988) 5

Kaimowitz v. Greater Orlando Legal Services, Inc.,
Case No. 86-781-CIV-ORL-18 (March 3, 1988) 5

LeMaster v. United States,
891 F.2d 115 (6th Cir. 1989) 10

Liljeberg v. Health Services Acquisition Corp.,
486 U.S. 847, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988) . . 16

Mann v. G. & G. Mfg., Inc.,
900 F.2d 953 (6th Cir.), cert.denied sub nom,
Sloan v. G. & G. Mfg., Inc., __U.S.__,
111 S. Ct. 387, 112 L. Ed. 2d 398 (1990) 10

McGregor v. Bd. of Court Comm'rs for Palm Beach County,
130 F.R.D. 464 (S.D. Fla. 1990) 11

McWhorter v. Birmingham,
906 F.2d 674 (11th Cir. 1990), reh'g denied, en banc,
917 F.2d 570 (1990) 17

Mihalik v. Pro Arts, Inc.,
851 F.2d 790 (6th Cir. 1988) 9

Muthig v. Briant Point Nantucket, Inc.,
838 F.2d 600 (1st Cir. 1988) 10

National Association of Govt. Employees, Inc. v. National Federation of Fed. Employees,
844 F.2d 216 (5th Cir. 1988) 9

Parker v. Conners Steel Co.,
855 F.2d 1510 (11th Cir. 1988), cert. denied,
490 U.S. 1066, 109 S. Ct. 2066, 104 L. Ed. 2d 631 (1989) .. 18

Rossman v. State Farm Mut. Auto Ins. Co.,
832 F.2d 282 (4th Cir. 1987) 8

Sullivan v. School Board of Pinellas County,
773 F.2d 1182 (11th Cir. 1985) 9, 11

Thomas v. Capital Securities Serv., Inc.,
836 F.2d 866 (5th Cir. 1988)(en banc) 13

United States v. Cepeda Penes,
577 F.2d 754 (1st Cir. 1978) 17

United States v. Chantal,
902 F.2d 1018 (1st Cir. 1990) 17

United States v. Mitchell,
886 F.2d 667, (4th Cir. 1989) 17

United States v. Merkt,
794 F.2d 950 (5th Cir. 1986), cert.denied,
480 U.S. 946 (1987) 17

United States v. Monoco,
852 F.2d 667 (9th Cir. 1988), cert. denied,
488 U.S. 1040 (1989) 17

United States v. Somorons,
918 F.2d 592 (6th Cir. 1990) 17

Unity Ventures v. County of Lake.
894 F.2d 250 (7th Cir. 1990) 11

Uselman v. Uselman,
464 N.W.2d 130 (Minn. 1990) 9

Vaughner v. Pulito,
804 F.2d 873 (5th Cir. 1986) 11

Waller v. U.S.,
__ U.S. __, 60 U.S.L.W. 3813 (June 1, 1992) 17

Ward v. Village of Monroeville,
409 U.S. 57, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972) 17

White v. General Motors Corp.,
908 F.2d 675 (10th Cir. 1990), cert. denied,
__U.S.__, 111 S. Ct. 788, 112 L. Ed. 2d 850 (1991) . . . 13, 14

White v. Raymark Indus.,
783 F.2d 1175 (4th Cir. 1986) 15

Williams v. Orange Co. Fla. Bd. of Commrs.,
Civ. No. 90-547-CIV-ORL-18 (July 23, 1990) 6

In Re Yagman,
796 F.2d 1165 (9th Cir. 1986), cert. denied
sub nom, Real v. Yagman, 484 U.S. 963, 108 S. Ct. 450,
98 L. Ed. 2d 390 (1987) 11, 13

Miscellaneous

Advisory Committee on Civil Rules, Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence 36 (May 1992) 11, 12

American Bar Association, Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure, 121 F.R.D. 101 (1988) 8, 13

Committee on Federal Courts, Association of the Bar of the City of New York, Comments on Federal Rule of Civil Procedure 11 and Related Rules, 46 The Record of the Ass'n of the Bar of the City of N.Y., 267 (1991) 10, 13

Gregory P. Joseph, Sanctions: The Federal Law of Litigation Abuse (1989) 10

Note, Liljeberg v. Health Services Acquisition Corp.: The Supreme Court Encourages Disqualification of Federal Judges Under Section 453(a), 1989 Wis. L. Rev. 1033 18

William Scharzer, Rule 11 Revisited, 101 Harv. L. Rev. 1013 (1988) 10

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

GABE KAIMOWITZ, Petitioner

v.

BILL FREDERICK, THE ORLANDO TIMES, DR. CALVIN COLLINS, LOTTIE COLLINS, Respondents

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Gabe Kaimowitz respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on March 11, 1992.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Eleventh Circuit, a denial of petitioner's motion for rehearing and suggestion for rehearing en banc is not reported and is reprinted in the appendix hereto, p. 1a, infra. The Eleventh Circuit opinion is reported at 952 F.2d 410 and reprinted in the appendix, p. 2a, infra. The trial court order has not been reported. It is reprinted in the appendix, p. 3a, infra.

JURISDICTION

This Court has jurisdiction to review the instant case pursuant to 28 U.S.C. §1254(2). On March 11, 1992, the Eleventh Circuit issued an order denying petitioner's motions seeking rehearing. See p. 1a, infra. On May 14, 1992, Justice Kennedy ordered that the time for filing this petition for writ of certiorari be extended to and including July 9, 1992 (Order No. a-849).

STATUTES AND RULES INVOLVED

28 U.S.C. §144

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not

less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. §455

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding.

42 U.S.C. §1988

In any action or proceeding to enforce a provision of sections 1977, 1977A, 1981, 1982, 1983, 1985 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Federal Rule of Civil Procedure 11

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion or other paper and state the party's address. Except when otherwise

specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

STATEMENT OF THE CASE

From November 1, 1986 until March 1987, Plaintiff-Petitioner Gabe Kaimowitz ("Kaimowitz") was employed as consulting managing editor by defendant The Orlando Times ("the Times"), which is owned by defendant-respondents Dr. Calvin Collins and Lottie Collins ("Collins").[1] Petitioner was discharged for failing to obtain approval prior to publication of a caption critical of defendant-respondent Bill Frederick ("Frederick"), Mayor of Orlando. After his dismissal, the Times refused to accept advertising submitted by Petitioner and also refused to accept for publication news articles submitted by others associated with Kaimowitz or his clients.

Petitioner filed suit alleging violations of 42 U.S.C. §§1981, 1983 and 1985 as well as claims arising under state law. Upon learning that the case had been assigned to Judge G. Kendall Sharp, Petitioner submitted an affidavit of prejudice pursuant to 28 U.S.C. §§144 and 455. The basis for the recusal motion was Judge Sharp's membership in a club with a history of restrictive admission policies toward blacks and Jews. Kaimowitz is Jewish and the majority of his clients are black. In four other cases involving Petitioner, Judge Sharp disqualified himself because of bias toward Kaimowitz or facts subjecting the court's impartiality to reasonable question.[2] In the instant matter, however, Judge Sharp

---

[1] The instant matter was initially styled below as Elona v. Frederick because Petitioner Kaimowitz was writing under the pen name David Elona at the time of his discharge from the Orlando Times.

[2] See Kaimowitz v. Greater Orlando Legal Services, Inc., Case. No. 86-781-CIV-ORL-18 (March 3, 1988); Kaimowitz v. Florida Bar, Civ. No. 88-835-CIV-ORL-18 (Sept. 22, 1988) ; Committee of Organized Groups (COG) v. City of Orlando,

refused without explanation to recuse himself. Subsequent motions for disqualification were also denied.

Respondent Frederick moved to dismiss the complaint for failure to state a claim and for Rule 11 sanctions. After the court's decision to defer action on this motion, Respondent moved for summary judgment. Following denial of this motion, Respondent made three additional motions seeking summary judgment, all of which were again denied or deferred by the court.

Trial of the case took four days. After denial of Respondent's motion for directed verdict, the jury deliberated and found for defendants. Thereafter, the court entered an "Order to Show Cause" requiring Petitioner to defend Respondent's Rule 11 motion. Subsequently, a hearing was held and the court ordered sanctions. Petitioner was ordered to pay more than $37,000, virtually all of defendant's court costs and counsel fees as well as more than $2,000 in administrative costs and expenses associated with the proceeding, including juror fees (appendix p. 6a).

The court concluded that sanctions were justified because "[b]ased on the evidence adduced at the hearing and on the court's observations of the pleadings and of the trial . . .this lawsuit was frivolous and vexatious from the beginning." (appendix, p. 4a). Referring to its decisions refusing Respondent Frederick's motions for pretrial dismissal, the court's justification was as follows:

> [t]he court, however, allowed the case to go to trial not because plaintiff presented sufficient

---

Fla., Case No. 88-962-CIV-ORL-18 (Oct. 31, 1988); Williams v. Orange Co., Fla. Bd. of Commrs., Case No. 90-547-CIV-ORL-18 (July 23, 1990).

> evidence to withstand the pre-trial motions, but because the court wanted to see whether plaintiff could present any evidence at trial. . . . [i]n this case . . . decisive facts never emerged, the case was frivolous and unreasonable from the outset, and plaintiff failed 'to produce any evidence in support of material issues' on any of his claims. . . . the court sent the case to the jury not because it perceived factual basis for the claim, but because it wanted plaintiff to receive a jury verdict. Only then would plaintiff know that the outcome of the case was based on the merits rather than on judicial bias. (appendix p. 5a-6a).

The Eleventh Circuit affirmed without opinion (appendix, p. 2a) and denied Petitioner's motion for rehearing and suggestion of rehearing en banc (appendix, p. 1a).

REASONS FOR GRANTING THE WRIT

I.

There Exists A Sharp Division in the Circuits Regarding Whether A Claim That Has Survived Pretrial Dismissal Motions and Received a Full Scale Trial Can Be Unsupported In Fact Or Unwarranted In Law Within The Meaning of Rule 11.

Rule 11 deems sanctionable only those claims that are not well grounded in fact, warranted by existing law, or supported by a good faith basis for reform in the law. It targets situations where it is "patently clear that a claim has

absolutely no chance of success".[3] A complaint or claim failing to meet this standard would logically be vulnerable to a motion to dismiss or summary judgment motion and would normally be eliminated by the district court well before trial. Presumably, therefore, a claim so factually weak that it fails to satisfy Rule 11 must logically also fail to create a genuine issue requiring trial and could therefore be quickly dispatched with an early motion for summary judgment in those cases where a Rule 12(b)(6) motion can not itself eliminate the frivolous claim.[4] Consequently, if both Rule 12(b)(6) dismissal and summary judgment were properly denied, there can be, absent fraud or other egregious misconduct, no sanctionable violation of Rule 11.[5] Similarly, a claim that is so utterly frivolous that it permits an award of counsel fees under 42 U.S.C. §1988 must by definition lack the factual and legal strength to withstand pretrial disposition. Despite the logic of this approach, lower courts have divided on whether denial of potential dismissal limits a court's power to impose sanctions.

---

[3] Associated Indem. Corp. v. Fairchild Indus., Inc., 961 F.2d 32, 35 (2d Cir. 1992)(citations omitted).

[4] See Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) (where facts of record permit only one conclusion, summary judgment apt).

[5] See Gaiardo v. Ethyl Corp., 835 F.2d 479, 482-83 (3d Cir. 1987)(even claims quickly dismissed pursuant to Rule 12(b)(6) are not presumptively sanctionable); Rossman v. State Farm Mut. Auto Ins. Co., 832 F.2d 282, 289-90 (4th Cir. 1987)(no violation of Rule 11 to pursue litigable issue of fact); American Bar Association, Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure, 121 F.R.D. 101, 124 (1988)("ABA Standards").

Panels in three circuits have strongly stated that claims surviving through trial are not frivolous within the meaning of Rule 11. See Healey v. Chelsea Resources, Ltd., 947 F.2d 611 (2d Cir. 1991)(denial of summary judgment demonstrates that claimant's testimony not incredible or inadequate as a matter of law); [6] Mihalik v. Pro Arts, Inc., 851 F.2d 790, 794 (6th Cir. 1988)("if [plaintiffs'] claims were so frivolous, we find it remarkable that the district court would allow the case to go to trial. Obviously, the court believed that a trial was necessary in order to determine which side had the superior position. In such a situation, it would be highly unusual and almost certainly inappropriate to impose Rule 11 sanctions against one party merely because the other side prevailed"); National Association of Govt. Employees, Inc v. National Federation of Fed. Employees, 844 F.2d 216, 223 (5th Cir. 1988)(Rule 11 sanctions inappropriate where court has denied directed verdict, suggested settlement). This appeared at one time to be the view of the Eleventh Circuit. See Sullivan v. School Board of Pinellas County, 773 F.2d 1182 (11th Cir. 1985)(suggesting that claims surviving attack by pretrial motion and going to trial are not apt for Rule 11 sanction absent special circumstances). A respected state court has also taken this approach in applying state versions of Rule 11. See, e.g., Uselman v. Uselman, 464 N.W.2d 130, 144 (Minn. 1990)(claims reaching trial were not apt candidates for sanction under Minn. R. Civ. P. 11).

Other panels have adopted the opposite position,

---

[6] The Second Circuit in Healey reversed the bulk of sanctions imposed in a district court opinion that clearly denied any possible link between a summary judgment denial and the factual and legal colorability of the claim. See 133 F.R.D. 449, 454 (S.D.N.Y. 1990). See also Greenberg v. Hilton Int'l Co., 870 F.2d 926, 937 (2d Cir. 1989)(Ordinarily, claims surviving to trial should not be sanctionable).

suggesting that a claim's survival through trial bears no relation to sanctions practice. See Jennings v. Joshua Independent School District, 877 F.2d 313, 319-20 (5th Cir. 1989) cert. denied, 496 U.S. 935 (1990)(affirming bulk of sanctions awarded against plaintiff based on alleged legal inadequacy of claim that survived through trial)(modified at 948 F.2d. 194 (1991), cert. denied, __ U.S. __, 60 U.S.L.W. 3815 (June 1, 1992); LeMaster v. United States, 891 F.2d 115, 121 (6th Cir. 1989); Mann v. G & G Mfg., Inc., 900 F.2d 953, 960-61 (6th Cir. 1990) cert. denied. sub. nom., Sloan v. G & G. Mfg., Inc., ___ U.S. ___, 111 S. Ct. 387, 112 L. Ed. 2d 398 (1990); Muthig v. Briant Point Nantucket, Inc., 838 F.2d 600, 606 (1st Cir. 1988); Barrios v. Pelham Marine, Inc., 796 F.2d 128, 132 (5th Cir. 1986); (affirming or awarding Rule 11 sanctions despite prior denial of summary judgment motions).

Scholars and bar associations have supported the view that claims surviving pretrial dismissal motions should be presumptively immune from Rule 11 sanctions. See Committee on Federal Courts, Association of the Bar of the City of New York, Comments on Federal Rule of Civil Procedure 11 and Related Rules, 46 The Record of the Ass'n of the Bar of the City of N.Y., 267, 286 (1991)("[a]bsent fraud or knowing misrepresentation, compensatory sanctions should not be imposed when the party being sanctioned survived a motion to dismiss or for summary judgment."(footnote omitted); Gregory P. Joseph, Sanctions: The Federal Law of Litigation Abuse §11(F) at 169-70 (1989)(although summary judgment denial should not be a per se bar to sanctions, "fact that a case gets to trial is some measure of its merit"); William Scharzer, Rule 11 Revisited, 101 Harv. L. Rev. 1013, 1019 (1988)("[o]ne might well wonder how a case could be so frivolous as to warrant sanctions if it has sufficient merit to get to trial").

The Advisory Committee on the Federal Civil Rules of the Judicial Conference of the United States has strongly

suggested the same approach. Recently, the Advisory Committee issued a substantially revised Rule 11 designed to lessen its potential chilling effect. The draft Advisory Committee Note to Proposed Rule 11 states that "[I]f a party has evidence with respect to a contention that would suffice to defeat a motion for summary judgment based thereon, it would have sufficient 'evidentiary support' [within the meaning of the proposed Rule] for purposes of [satisfying] Rule 11." See Advisory Committee on Civil Rules, Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence 36 (May 1992)("Proposed Rules").[7]

The imposition of sanctions against Petitioner reflects the error in cases finding no relation between pretrial proceedings and Rule 11 and resembles the discredited merchant's practice of "bait-and-switch": plaintiff is encouraged to pursue the claim and then required to pay defendant's subsequently accumulated, sizeable counsel fees merely because he lost at trial. See In re Yagman, 796 F.2d 1165, 1183 (9th Cir. 1986), cert. denied sub. nom., Real v.

---

[7] An approach permitting sanction of claims heard at trial is particularly inapt when applied to 42 U.S.C. §1988. In Hughes v. Rowe, 449 U.S. 5 (1980); Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) this Court established a seemingly clear presumption against sanctioning unsuccessful civil rights and job discrimination claimants absent a palpably frivolous case apparent to all from the outset. Courts interpreting Section 1988 in the light of Christiansburg Garment and Hughes v. Rowe have hewed to this principle, making defense fee awards a rarity. See, e.g., Unity Ventures v. County of Lake, 894 F.2d 250 (7th Cir. 1990); Vaughner v. Pulito, 804 F.2d 873 (5th Cir. 1986); Sullivan v. School Bd. of Pinellas County, 773 F.2d 1182, 1188-90 (11th Cir. 1985); Jones v. Texas Tech University, 656 F.2d 1137, 1145 (5th Cir. 1981); McGregor v. Bd. of Court Cmm'rs for Palm Beach County, 130 F.R.D. 464 (S.D. Fla. 1990).

Yagman, 484 U.S. 963 (1987)(deterrent purpose of Rule 11 not well-served "by tolerating abuses during the course of an action and then punishing the offender after the trial is at an end").

The sanctions order also has implications that go beyond mere isolated error. Courts operating in the manner of the trial court below place attorneys and litigants in an untenable position. Counsel and the parties must not only "stop and think" about the Rule 11 implications of a litigation position prior to filing a paper with the court but must also assess the risk of proceeding with the claim or position throughout the litigation, knowing that a court could belatedly label the paper "frivolous" no matter how many pretrial rulings to the contrary are made by the court.[8]

Unless this Court sets forth clear limits preventing similar eleventh hour sanctioning after trial, attorneys and litigants, face a continuing, substantial risk of sanctions merely by continuing to prosecute claims for which they have the benefit of a favorable pretrial ruling. Further, the history of the instant case suggests that busy appellate courts have read the "abuse of discretion" review standard governing sanctions practice as a virtual blank check for district judges. This situation can only have an unwise chilling effect on counsel and clients, even those with meritorious claims. The

---

[8] The Civil Rules Advisory Committee has recognized this risk and attempted to minimize it through Proposed Amended Rule 11. Under the Proposed Rule, the filing of a signed paper with the court would impose a continuing duty on counsel and the parties to correct or withdraw positions that later are seen as frivolous. However, counsel fees may not be awarded as a sanction where an offending paper is modified or withdrawn within 21 days after service of the motion by opposing counsel. See "Proposed Rules" at 33).

instant case suggests the need for this Court to exercise its supervisory powers to clarify application of these important and frequently invoked federal laws.

II.

The Circuits Are Also In Sharp Conflict Regarding Whether to Adopt the "Least Severe Sanction" Test for Reviewing Rule 11 Sanctions.

Approximately half the circuit courts have expressly adopted the "least severe sanction" approach in order to control Rule 11 practice and prevent trial court abuses. As one circuit court recently stated, Rule 11 should "not degenerate into nothing more than a docket control device that the district courts use to punish unsuccessful litigants who dare to raise their claims or defenses in federal court."[9] Under this standard, courts invoking Rule 11 may impose only the least severe sanction adequate to serve the purposes of the Rule. See, e.g., Danvers v. Danvers, 959 F.2d 601, 605 (6th Cir. 1992); White v. General Motors Corp., 908 F.2d 675, 684-85 (10th Cir. 1990), cert. denied, __ U.S. __, 111 S. Ct 788, 112 L. Ed. 2d 850 (1991); Hilton Hotels Corp. v. Banov, 899 F.2d 40, 46 (D.C. Cir. 1990); Thomas v. Capital Securities Serv., Inc., 836 F.2d 866 (5th Cir. 1988) (en banc); Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1437 (7th Cir. 1987); Cabell v. Petty, 810 F.2d 463, 466-67 (4th Cir. 1987); In re Yagman, 796 F.2d 1165, 1182-83 (9th Cir. 1986), cert. denied, sub. nom., Real v. Yagman, 484 U.S. 963 (1987). Prominent bar organizations have also endorsed the least severe sanction approach. See, e.g., ABA Standards, supra, 121 F.R.D. at 124; New York Bar Comments, supra, 11 The Record at 282-86.

---

[9] Akin v. Q-L Investments, Inc., 959 F.2d 521 (5th Cir. 1992).

However, the remaining circuits, including the Eleventh Circuit, have yet to adopt the least severe sanction remedial standard. See Avirgan v. Hull, 932 F.2d 1572 (11th Cir. 1991), cert. denied, __ U.S. __, 112 S. Ct. 913 (1992) (more than $1 million in sanctions assessed against plaintiff's counsel). As a consequence, lawyers and litigants in these circuits are at greater risk of sanctions. For example, courts applying the least severe sanction approach have focused primarily on the deterrent purpose of Rule 11, asking what sanction will discourage future frivolous litigation and poor lawyering practices without punishing the offending party or counsel beyond the point of adequate deterrence. Proportionality was not examined in the instant case.

In addition, the Fifth Circuit, which has been the foremost proponent of the least severe sanction approach, requires that the sanction imposed is in fact the least severe sanction adequate to accomplish the deterrent purposes of Rule 11. Trial courts in the Fifth Circuit must "enter specific factual findings to assist the appellate court in its review" of both the decision to sanction and the type of sanction imposed. They are strongly encouraged and virtually required to indicate the factors that led to the sanction and to describe the consideration and rejection of alternative sanctions. See Akin v. Q-L Investments, Inc., 959 F.2d 521 (5th Cir. 1992). Other "least severe sanction" circuits require that a sanctioning court consider the offending party's ability to pay. See, e.g., Danvers v. Danvers, 959 F.2d 601 (6th Cir. 1992); White v. General Motors Corp., 908 F.2d 675, 683 (10th Cir. 1990), cert. denied, __ U.S. __, 111 S. Ct. 788, 112 L. Ed. 2d 850 (1991). In the instant case, the district court neither made particularized findings nor considered Petitioner's ability to pay.

Rule 11 sanctions do not "shift the entire cost of litigation; they shift only the cost of a discrete event." Business Guides v. Chromatic Communications Enterprises,

Inc., __ U.S. __, 111 S. Ct. 922, 934, 112 L. Ed. 2d 1140, 1160 (1991). Consequently, a court determining a Rule 11 motion must focus on the particular statements in a paper filed with the court and make findings as to why that portion of the paper violates Rule 11. Because the district courts Order lacked such focus and explanation and implicitly rejected the least severe sanctions approach, it effectively converted Rule 11 into a fee shifting statute which violates Business Guides and other precedents of this Court. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990)(Rule 11 not a fee-shifting statute).

III

There Exists a Conflict in the Circuits Regarding Whether The Collateral Costs of Judicial Administration, Such As Juror Fees, May Be Awarded As A Rule 11 Sanction

Several circuit courts have firmly taken the view that even if conduct is sanctionable pursuant to Rule 11, "overhead" expenses of the judicial system are not a properly recoverable item of sanctions. See, Blue v. Dept. of the Army, 914 F.2d 525 (4th Cir. 1990), cert. denied sub. nom, Chambers v. United States Department of the Army, _ U.S._, 111 S. Ct. 1580, 113 L. Ed. 2d 645 (1991). See also White v. Raymark Indus., 783 F.2d 1175 (4th Cir. 1986); Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987)(recoverable costs under 28 U.S.C. §1920 strictly construed).

In Blue, the Fourth Circuit held that judicial and support staff salaries could not be shifted to either counsel or to a party as a Rule 11 sanction but found that juror fees might be part of a sanction award if authorized by local rule. See 914 F.2d at 543. Because the Middle District of Florida has no local rule providing for such shifting of overhead expenses to a sanctioned litigant, the Eleventh Circuit decision below stands in direct conflict with the Fourth

Circuit.

IV.

The Erratic Recusal Practice of the District Judge Conflicts With Decisions of This Court in a Matter of Fundamental Importance – The Integrity of the Judicial System.

As detailed in the Statement of the Case, the most euphemistic term for describing the relationship between the trial judge and Petitioner is "strained." Kaimowitz has been an active lawyer and litigant who sought Judge Sharp's disqualification in several matters due to Judge Sharp's reported membership in the University Club, a private club widely reputed to exclude women, blacks and Jews from membership. Kaimowitz is Jewish and specializes in civil rights law, primarily representing black clients. Although Judge Sharp appears unrepentant about his association with the University Club,[10] he nonetheless at one time disqualified himself in cases involving Kaimowitz in part because he admitted personal distaste for Kaimowitz. Despite this, Judge Sharp has subsequently presided over other cases involving Kaimowitz, including the instant case.

Under this Court's precedent Judge Sharp should have recused himself pursuant to 28 U.S.C. §455(a), which requires recusal even if the judge is unaware of the suspicious circumstances calling his impartiality into question. See Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847

---

[10] Ironically, Judge Sharp's affiliation with the University Club would today probably be sufficient to prevent his appointment to the bench in view of the Senate Judiciary Committee's recent treatment of such associations by judicial nominees.

(1988). "The goal of section 455(a) is to avoid even the appearance of partiality" Liljeberg, (486 U.S. at 858) so that the statute promotes "public confidence in the integrity of the judicial process." Liljeberg, 486 U.S. at 858.

The circuits are in conflict regarding whether Section §455(a) disqualification is affected by the source of the court's bias. See Waller v. United States, __ U.S. __, 60 U.S.L.W. 3813 (June 1, 1992)(White and O'Connor, JJ., dissenting from denial of certiorari because of inter-circuit conflict on this issue). One circuit has held that a section 455(a) challenge is permitted even where factors bringing the judges's impartiality into question are acquired through judicial proceedings. See United States v. Chantal, 902 F.2d 1018 (1st Cir. 1990); United States v. Cepeda Penes, 577 F.2d 754, 758 (1st Cir. 1978). However, five circuit courts have held that Section 455(a) disqualification will not lie where there is a judicial origin of factors subjecting the judge's fairness to question. See United States v. Somorons, 918 F.2d. 592, 599 (6th Cir. 1990); United States v. Mitchell, 886 F.2d 667, 671 (4th Cir. 1989); United States v. Monoco, 852 F.2d 1143, 1147 (9th Cir. 1988), cert. denied, 488 U.S. 1040 (1989); United States v. Merkt, 794 F.2d 950, 960 (5th Cir. 1986) cert. denied, 480 U.S. 946 (1987). Among these is the Eleventh Circuit. See McWhorter v. Birmingham, 906 F.2d 674, 678 (11th Cir. 1990) reh. denied, 917 F.2d 570 (1990). Because there was little discussion of the issue below, it is unclear what role this precedent may have played in the instant case.

However, disqualification is required under the recusal statutes (§§144 and 455(b)(1) as well as §455(a)) where the Judge's bias, even if judicially acquired, is so pervasive as to permeate the trial proceedings and make fair administration of justice impossible. See Berger v. United States, 255 U.S. 22 (1921). A sufficient lack of impartiality--or even its serious possibility--has been held to violate constitutional due process. See Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813

(1986); Ward v. Village of Monroeville, 409 U.S. 57, 61-62 (1972).

Unfortunately, the Eleventh Circuit appears to hold little allegiance to this Court's precedent regarding disqualification. See, e.g., Parker v. Connors Steel Company, 855 F.2d 1510 (11th Cir. 1988) cert. denied, 490 U.S. 1066 (1989), (finding "harmless error" in §455(a) violation where trial judge decided case on summary judgment and law clerk working on the matter was the son of a lawyer representing two of the prevailing parties benefitting from the judge's summary judgment ruling). See also Note, Liljeberg v. Health Services Acquisition Corp.: The Supreme Court Encourages Disqualification of Federal Judges Under Section 455(a), 1989 Wis. L. Rev. 1033 (criticizing Parker as inconsistent with this Court's decision in Liljeberg).

CONCLUSION

This case presents important questions regarding the consistent, fair, and useful operation of key sanctions, fee shifting, and disqualification practices as to which there are significant conflicts within the circuits. Petitioner's case merits review by this Court.

Respectfully Submitted,

MORTON STAVIS
GEORGE COCHRAN
Center for Constitutional Rights
666 Broadway Seventh Floor
New York, NY 10012
(212) 614-6427

JEFFREY W. STEMPEL
Brooklyn Law School
250 Joralemon Street

Brooklyn, NY 11201
(718) 780-7953
Counsel of Record

July 9, 1992 .

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 90-4048 & 90-4154

Filed U.S.
Court of Appeals
Mar. 11, 1992
Miguel J. Cortez
Clerk

DAVID ELONA, a/k/a H.G. Lifeson, a/k/a
THE OLD STORYTELLER, GABE KAIMOWITZ,

Plaintiffs-Appellants,

versus

BILL FREDERICK, MAYOR OF ORLANDO, FLORIDA, INDIVIDUALLY, BILL FREDERICK, IN HIS OFFICIAL CAPACITIES, THE ORLANDO TIMES, a news weekly and its publisher, DR. CALVIN COLLINS, LOTTIE COLLINS, AND THEIR AGENTS,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Florida

---

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: HATCHETT and BIRCH, Circuit Judges, and MORGAN, Senior Circuit Judge.

PER CURIAM:(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure: Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

\s Joseph W. Hatchett
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 90-4048 & 90-4154

D.C. Docket No. 89-00162-Civ-Orl-18

DO NOT PUBLISH

DAVID ELONA, a/k/a H.G. LIFESON, a/k/a THE OLD STORYTELLER, GABE KAIMOWITZ,

Plaintiffs-Appellants,

versus

BILL FREDERICK, MAYOR OF ORLANDO, FLORIDA, INDIVIDUALLY, BILL FREDERICK, IN HIS OFFICIAL CAPACITIES, THE ORLANDO TIMES, a news weekly and its publisher, DR. CALVIN COLLINS, LOTTIE COLLINS, AND THEIR AGENTS,

Defendants-Appellees.

Appeals from the United States District Court for the Middle District of Florida

---

(December 31, 1991)

Before HATCHETT and BIRCH, Circuit Judges, and MORGAN, Senior Circuit Judge.
PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.

MORGAN, Senior Circuit Judge.
PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DAVID ELONA, a/k/a H.G. LIFESON, a/k/a THE OLD STORYTELLER, a/k/a GABE KAIMOWITZ,

Plaintiff,

v.

CASE NO. 89-162-CIV-ORL-18

BILL FREDERICK, Mayor of Orlando, Florida, individually and in his official capacity; *THE ORLANDO TIMES*, a news weekly; DR. CALVIN COLLINS; & LOTTIE COLLINS,

Defendants.

ORDER

This action is before the court on defendants' motion for attorney's fees under 42 U.S.C. § 1988 (1988), for sanctions under Federal Rule of Civil Procedure 11, and for a supersedeas bond under Federal Rule of Civil Procedure 62(d). (Docs. 18, 19, 20, & 130). Plaintiff has opposed these motions. (Docs. 128, 129, 138 & 139).

I. Background

In February 1989, plaintiff filed a complaint alleging the following claims: violations under 42 U.S.C. §§ 1981, 1983, and 1985 (1988), violations under the first and fourteenth amendments of the United States Constitution, tortious interference with a business relationship, breach of contract,

and intentional infliction of emotional distress. All defendants answered and defendants The Orlando Times and the Collins' filed a counterclaim for assault.

After a five day trial, the jury returned a verdict for defendants on all plaintiff's claims and for plaintiff on defendants' counterclaim. After the trial, the court issued an order to show cause why plaintiff should not be sanctioned under Rule 11 for filing vexatious and frivolous pleadings. (Doc. 119). The court also instructed the parties to file memoranda and affidavits opposing or supporting the imposition of costs and attorney's fees. (Doc. 119). Both plaintiff and defendants responded to the court's order with memoranda and affidavits. (Docs. 125, 126, 127, 128, 129, 130, & 131).

On November 16, 1990, the court held a hearing on the imposition of Rule 11 sanctions and attorney's fees. Based on the evidence adduced at the hearing and on the court's observations of the pleadings and of the trial, the court determined that this lawsuit was frivolous and vexatious from the beginning. Accordingly, the court sanctioned plaintiff under Rule 11 and ordered him to pay the government the expense of selecting and maintaining a jury. In addition, the court granted defendant's motions for attorney's fees. The court permitted defendants to submit affidavits establishing the amount of their attorney's fees and allowed plaintiff to respond to these affidavits.

II. Legal Conclusions

A. Rule 11 Sanctions

"Rule 11 imposes a duty on attorneys to certify that they have... determined that any papers filed with the court are well-grounded in fact... and [are] not interposed for any

improper purpose." Cooter & Gell v. Hartmarx, 110 S.Ct. 2447, 2454 (1990); Fed. R. Civ. P. 11. As stated at the November 16 hearing, the complaint filed in this case was completely factually groundless from the outset. Plaintiff presented no cognizable evidence of a conspiratorial agreement between defendants Frederick, The Orlando Times, or the Collins's or of overt acts suggesting a conspiracy. See Collins v. Walden, 834 F.2d 961, 965 (11th Cir. 1987). Furthermore, plaintiff failed to present any cognizable facts to support his other claims.

Plaintiff contends that the complaint must have had some merit because it withstood defendants' motion to dismiss and motions for summary judgment, and because the court sent the case to the jury for deliberation on the merits rather than direct a verdict in favor of defendants at the close of plaintiff's case. The court, however, allowed the case to go to trial not because plaintiff presented sufficient evidence to withstand the pre-trial motions, but because the court wanted to see whether plaintiff could present any evidence at trial. Plaintiff further contends that the case must have been meritorious for the jury to spend four and one-half hours deliberating. During this time, however, the jury ate lunch, examined 118 exhibits, including 90 newspaper articles and advertisements Orlando Sentinel, the Orlando Times, and other publications, and deliberated over the counterclaim. In the court's opinion, a responsible jury would have needed at least four and one-half hours to read the newspaper articles alone. Finally, plaintiff has repeatedly accused the court of prejudice. As a result, the court sent the case to the jury not because it perceived factual basis for the claim, but because it wanted plaintiff to receive a jury verdict. Only then would plaintiff know that the outcome of the case was based on the merits rather than on judicial bias.

In sum, plaintiff signed the complaint and other papers when he knew or objectively should have known they

were factually groundless and, as a result, plaintiff is subject to monetary sanctions. See United States v. Milam, 855 F.2d 739, 743 (11th Cir. 1988); Donaldson v. Clark, 819 F.2d 1551, 1557 (11th Cir. 1987). As stated at the November 16 hearing, plaintiff must reimburse the government for the jury expenses. The jury expenses consist of paying the per diem allowances to the original pool of jurors used to select a jury, of paying the per diem allowances of the jury for five days, of milage allowances, and of the jurors' meals. The total cost amounted of selecting and maintaining the jury is $2,138.55. See Elster v. Alexander, 122 F.R.D. 593, 604 (N.D. Ga. 1988); Harrell v. Joffrion, 73 F.R.D. 267, 268 (W.D. La.), aff'd without an opinion, 545 F.2d 167 (5th Cir. 1976).

B. Attorney's Fees

Based on its observations of the pleadings, the trial, and the hearing, the court concludes that plaintiff's claims were "frivolous, unreasonable, or without foundation." Hughes v. Rowe, 449 U.S. 5. 14 (1980)(quoting Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978); 42 U.S.C. § 1988. In addition to its observations of the pleadings and trial, the court notes that plaintiff passed out business cards advertising that he sued city hall. This evidence suggests to the court that plaintiff would sue the city of Orlando or the mayor of Orlando on any pretense, including the frivolous one here.

As in his Rule 11 defense, plaintiff contends that the case must have been sufficiently meritorious to withstand both a motion to dismiss and motion for summary judgment. Plaintiff correctly notes that when the court contemplates awarding attorney's fees under section 1988, it should consider whether he established a prima facie case, whether the case was dismissed prior to trial, or whether the court held a full-blown trial on the merits. Sullivan v. School Bd. of Pinellas County, 773 F.2d 1182, 1189 (11th Cir. 1985). As

previously stated, the court allowed the case to go to trial only to see whether plaintiff would present any evidence to support his allegations. In this case, however, decisive facts never emerged, the case was frivolous and unreasonable from the outset, and plaintiff failed "to produce any evidence in support of material issues" on any of his claims. Desisto College, Inc. v. Town of Howey-in-the-Hills, 718 F.Supp. 906, 915 (M.D. Fla. 1989), aff'd sub nom. Desisto College, Inc. v. Line, 914 F.2d 267 (11th Cir. 1990). Accordingly, the court awards attorney's fees to defendants under 42 U.S.C. § 1988.

Attorney's fees are calculated by multiplying a reasonable hourly rate by the number of hours reasonably expended. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). The reasonable hourly rate is the "prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." Norman v. Housing Authority, 836 F.2d 1292, 1299 (11th Cir. 1988). Defendant- Frederick submitted an affidavit establishing the number of hours expended on this case and an affidavit establishing the reasonable hourly rate for attorneys with comparable skill, experience, and reputation in the Orlando legal community. (Docs. 125 & 126). Based on these affidavits, the court awards defendant Frederick $27,203.50 in attorney's fees. The Orlando Times and the Collins's also submitted an affidavit establishing the number of hours expended on this case and what they considered to be a reasonable hourly rate. (Doc. 130). Although these defendants neglected to submit a supporting affidavit establishing the reasonableness of their hourly rate, the court nevertheless finds it reasonable Id. at 1303 ("where there is a lack of documentation or testimonial support the court may make the award on its own experience"). In addition the affidavits submitted by The Orlando Times and the Collins's do not state the time spent pursuing the unsuccessful counterclaim for assault. Accordingly, the court reduces the hours expended on the suit by twenty hours to reflect the

time spent on this unsuccessful claim and awards The Orlando Times and the Collins's $8,018.75 in attorney's fees. Id. at 1302 (district court should deduct time spent on unsuccessful claims). Plaintiff is responsible for paying defendants these amounts.

C. Supersedeas Bond

Plaintiff has appealed the judgment entered November 9, 1990. Defendant Frederick has moved for a supersedeas bond for the amounts awarded in this order pending plaintiff's appeal. The court grants defendants' motion and, on request for a stay pending appeal, requires plaintiff to post a supersedeas bond for Frederick's attorney's fees awarded in this order. Fed. R. Civ. P. 62(d).

III. Conclusion

The court finds that plaintiff violated Rule 11 and fines him to compensate the government for the expense of selecting and maintaining a jury. The court also finds that plaintiff's case was frivolous and factually groundless from the beginning and orders plaintiff to reimburse defendants for their attorney's fees. Finally, the court requires plaintiff to post a supersedeas bond for the total amount of Frederick's attorney's fees for which he is responsible as a result of this order. Accordingly, the court ORDERS plaintiff to pay $27,203.50 to defendant Frederick and $8,018.75 to defendants The Orlando Times and the Collins's. The court also ORDERS plaintiff to pay the court $2,138.55. Finally, the court ORDERS plaintiff to post a supersedeas bond for $27,203.50 in the event of appeal.

It is SO ORDERED in Orlando, Florida, this 17th day of December 1990.

\s G. Kendall Sharp
G. KENDALL SHARP, USDJ

Supreme Court, U.S.
FILED
SEP 9 1992
OFFICE OF THE CLERK

No. 92-79

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

GABE KAIMOWITZ,

Petitioner,

v.

BILL FREDERICK, THE ORLANDO TIMES,
DR. CALVIN COLLINS, LOTTIE COLLINS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

JEFFREY G. SLATER
Fla Bar No. 0324345
EUBANKS, HILYARD, RUMBLEY,
MEIER & LENGAUER, P.A.
P.O. Box 4973
Orlando, Florida 32802
(407) 425-4251

Attorneys for Respondent,
BILL FREDERICK.

September 9, 1992

Washington, D.C. • THIEL PRESS • (202) 328-3286

QUESTIONS PRESENTED

In accordance with rule 15.1, Rules of the Supreme Court, the Respondent submits that the questions presented for review by Petitioner do not accurately depict the issues before this court because they do not accurately reflect conflicts between the circuit courts and they do not accurately reflect the lower court's holding.

I. Whether there exists a sharp division in the circuits regarding whether a claim that has survived pretrial dismissal motions and received a full scale trial can be unsupported in fact or unwarranted in law within the meaning of Rule 11.

II. Whether there exists a sharp division in the circuits regarding whether to adopt the "least severe sanction" test for reviewing Rule 11 sanctions.

III. Whether there exists a sharp division in the circuits regarding whether the collateral costs of judicial administration, such as juror fees, may be awarded as a Rule 11 sanction.

IV. Whether the current conflict between the circuits regarding whether 28 U.S.C. §455(a) mandates that the cause of a judge's partiality or bias must stem from an extrajudicial source, is applicable to the case at bar.

TABLE OF CONTENTS

Page

QUESTION PRESENTED. i

TABLE OF AUTHORITIES ii

STATUTES AND REGULATIONS INVOLVED. 2

STATEMENT OF THE CASE 5

REASONS FOR DENYING THE WRIT 8

POINT I. THERE DOES NOT EXIST A SHARP DIVISION IN THE CIRCUITS REGARDING WHETHER A CLAIM THAT HAS SURVIVED PRETRIAL DISMISSAL MOTIONS AND RECEIVED A FULL SCALE TRIAL CAN BE UNSUPPORTED IN FACT OR UNWARRANTED IN LAW WITHIN THE MEANING OF RULE 11. 8

POINT II. THERE DOES NOT EXIST A SHARP DIVISION IN THE CIRCUITS REGARDING WHETHER TO ADOPT THE "LEAST SEVERE SANCTION" TEST FOR REVIEWING RULE 11 SANCTIONS 13

POINT III. THERE DOES NOT EXIST A SHARP CONFLICT BETWEEN THE CIRCUITS REGARDING WHETHER THE COLLATERAL COSTS OF JUDICIAL ADMINISTRATION, SUCH AS JUROR'S FEES, MAY BE AWARDED AS A RULE 11 SANCTION 16

POINT IV. THE CURRENT CONFLICT REGARDING WHETHER 28 U.S.C. §455(a) MANDATES THAT THE CAUSE OF APPARENT PARTIALITY OR BIAS MUST STEM FROM AN EXTRA-JUDICIAL SOURCE IS NOT APPLICABLE TO THE CASE AT BAR. 17

CONCLUSION 19

TABLE OF AUTHORITIES

Cases:

Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986). 19

Cases, continued: Page

Anheuser-Busch, Inc. v. Stroh Brewery Co., 750 F.2d 631 (8th Cir. 1984) 10

Avirgan v. Hull, 932 F.2d 1572 (11th Cir. 1991), *cert. den.*, ___ U.S. ___, 116 L.Ed.2d 813, 112 S.Ct. 913. 15

Barrios v. Pelham Marine, Inc., 796 F.2d 128, 132 (5th Cir. 1986) 13

Blue v. Dept. of the Army, 914 F.2d 525 (4th Cir. 1990), *cert. den. sub. nom., Chambers v. United States Dept. of the Army*, ___ U.S. ___, 113 L.Ed.2d 645, 111 S.Ct. 1580 (1991) 16

Brown v. Borough of Chambersburg, 903 F.2d 274 (3rd Cir. 1990) 12

Business Guides, Inc. v. Chromatic Comm., 498 U.S., ___, 112 L.Ed.2d 1140, 111 S.Ct. 922 (1991). 8

Calloway v. Marvel Entertainment Group, 854 F.2d 1452 (2d Cir. 1988), *rev'd on other grounds sub nom, Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989). 12-13

Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978). 11

Coleman v. General Motors Corp., 667 F.2d 704 (8th Cir. 1981) 12

Cooter & Gell v. Hartmarx Co., 496 U.S. 384 (1990) 9

Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987). 16

Eisenberg v. University of New Mexico, 936 F.2d 1131 (10th Cir. 1991) 17

Foster v. Mydas Associates, Inc., 943 F.2d 139 (1st Cir. 1991) 12

Greenberg v. Hilton Int'l. Co., 870 F.2d 926 (2d Cir. 1989), *vacated on other grounds*, 875 F.2d 39 (2d Cir. 1989) 11

Cases, continued: Page

Healey v. Chelsea Resources, Ltd., 947 F.2d 611 (2d Cir. 1991) 8, 9

In re Beard, 811 F.2d 818 (4th Cir. 1987) 18

Jennings v. Joshua Independent School District, 877 F.2d 313 (5th Cir. 1989) *cert. den.* 496 U.S. 935 (1990). 10-11

Langer v. Monarch Life Insurance Co., 966 F.2d 786, (3d Cir. 1992) 14

LeMaster v. United States, 891 F.2d 115 (6th Cir. 1989) 11, 13

Lewis v. Brown & Root, Inc., 711 F.2d 1287 (5th Cir. 1983) *cert. den.* 467 U.S. 1231 (1984) 12

Mann v. G&G Mfg., Inc., 900 F.2d 953 (6th Cir. 1990) *cert. den. sub. nom., Sloan v. G&G Mfg., Inc.*, ___ U.S. ___, 112 L.Ed.2d 398, 111 S.Ct. 382 (1990). 11, 13

Mihalik v. Pro Arts, Inc., 851 F.2d 790 (6th Cir. 1988). 10

Muthig v. Briant Point Nantucket, Inc., 838 F.2d 600 (1st Cir. 1988) 12

National Association of Govt. Employees, Inc. v. National Federation of Fed. Employees, 844 F.2d 216 (5th Cir. 1988) 10

Norton Tire Co., Inc. v. Tire Kingdom Co., Inc., 858 F.2d 1533 (11th Cir. 1988) 15

Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986) *cert. den. sub. nom. Suffolk County v. Graseck*, 480 U.S. 918 (1987). 14

Panzardi-Alvarez v. United States, 879 F.2d 975, (1st Cir. 1989) *cert. den.* 493 U.S. 1082 (1990) 17

Roleston v. Eldridge, 848 F.2d 163 (11th Cir. 1988) 15

Searle & Co. v. Cohn, 455 U.S. 404 (1982). 18

Sullivan v. School Board of Pinellas County, 773 F.2d 1182 (11th Cir. 1985) 11

Cases, continued: Page

Thomas v. Capital Security Serv., Inc., 836 F.2d 866 (5th Cir. 1988) (*en banc*). 14

United States v. Cepeda Reves, 577 F.2d 754 (1st Cir. 1978) 17-18

United States v. Chantal, 902 F.2d 1018 (1st Cir. 1990) 17

United States v. Cowden, 545 F.2d 257 (1st Cir. 1976), *cert. den.* 430 U.S. 909 (1977). 18

United States v. Grinnel Corp., 384 U.S. 563 (1966) 18

United States v. Kelly, 712 F.2d 884 (1st Cir. 1989) 17

United States v. Mitchell, 886 F.2d 667 (4th Cir. 1989) 18

Waller v. United States, ___ U.S. ___, 119 L.Ed.2d 239, 112 S.Ct. 2321 (1992) 17

White v. Raymark Indus., 783 F.2d 1175 (4th Cir. 1986) 16

Statutes:

28 U.S.C. § 144. 18

28 U.S.C. § 455. . . . . 17, 18

28 U.S.C. § 1920. 16

28 U.S.C. § 1927. . . . . 15, 16

42 U.S.C. § 1988 (1988). 8

Rules:

Fed. R. Civ. P. 11 . . . . . *passim*

Fed. R. Civ. P. 16 16

Fed. R. Civ. P. 56 13

Miscellaneous:

Fed. R. Civ. P. 11 Advisory Committee's Note 9

No. 92-79

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

GABE KAIMOWITZ,

Petitioner,

v.

BILL FREDERICK, THE ORLANDO TIMES, DR. CALVIN COLLINS, LOTTIE COLLINS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

The Respondent, Bill Frederick, requests that this Court deny the Petition for Writ of Certiorari seeking review of the per curiam affirmance by the Eleventh Circuit Court of Appeals entered March 11, 1992.

STATUTES AND REGULATIONS INVOLVED

28 U.S.C. §144

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. §455

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding.

28 U.S.C. §1920

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

28 U.S.C. §1927

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

42 U.S.C. §1988

In any action or proceeding to enforce a provision of sections 1977, 1977A, 1981, 1982, 1983, 1985 of this title, title IX of Public Law 92-318, ot title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Federal Rule of Civil Procedure 11

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signatures of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper, that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

STATEMENT OF THE CASE

The Respondent, Bill Frederick, cannot accept the Petitioner's statement of the case because it also incorporates argument for the Petitioner's position. On February 27, 1989 the Petitioner, who is an attorney, filed a pro se Complaint for Injunctive Relief and Damages in the United States District Court for the Middle District of Florida. (R 1-1) Defendants named in the Complaint included *The Orlando Times*, a weekly newspaper targeted to African-Americans, the owner and publisher of the newspaper, Dr. Calvin Collins, and his wife, Lottie Collins, who acted as the manager of the newspaper. Also named as a Defendant was Bill Frederick, the Mayor for the City of Orlando, Florida. Bill Frederick was sued in both his individual and official capacities.

The Petitioner was Consulting Managing Editor of *The Orlando Times* from November 1, 1986, until March, 1987. In March of 1987 the Petitioner was terminated by the newspaper Respondents. The owners of the newspaper testified that they terminated the Petitioner for being insubordinate. (R 7-188 through 208) Petitioner contends that he was discharged by the newspaper as part of an active conspiracy among the Respondents to violate Petitioner's civil rights. He claimed that the Collinses, whom are black, discriminated against him on the basis of his race and ethnicity. Petitioner is a white Jewish male.

Following his termination from *The Orlando Times*, Petitioner filed a lawsuit alleging violations of 42 U.S.C. §1981, 1983 and 1985. The Complaint alleged that Mayor Frederick had used his political power to have Petitioner terminated. Petitioner claimed that Frederick and *The Orlando Times* conspired to cause Petitioner's

termination from the newspaper and ruin his reputation among African-Americans in the Orlando area.

Respondent Frederick filed a Motion to Dismiss the Complaint. (R 1-14) Soon thereafter Frederick filed a Motion for Rule 11 Sanctions contending that Petitioner's lawsuit and Complaint were frivolous. (R 1-19) The District Court judge denied the Motion to Dismiss and deferred ruling upon the Rule 11 motion until the completion of trial. (R 1-14, 71) In his order denying one of these Motions for Summary Judgment the court wrote:

> "The court is unable to determine if there are any issues of fact against the Mayor. The court must await testimony at trial to see if sanctions will be appropriate against the Plaintiff for failing to prove any issues against the Mayor which are not frivolous." (R 2-71)

During the trial each of the individually named Respondents took the stand. Dr. Collins and Lottie Collins conceded that they were responsible for the decision to terminate the Petitioner from *The Orlando Times*. (R 7-57-277; R 9-48-81) They testified the Petitioner was terminated for insubordination. Dr. and Mrs. Collins emphatically denied that Mayor Bill Frederick had any part in the decision to terminate the Petitioner.

The Mayor also emphatically denied having any conversations with the Collinses about the Petitioner. (R 8-134, 135) Furthermore, the Petitioner failed to present any evidence to suggest that the Collinses or Mayor Bill Frederick had ever discussed the Petitioner and his employment at *The Orlando Times*. Respondent Frederick moved for a directed verdict at the close of Petitioner's Case in Chief which was denied in part and

granted in part. (R 8-183 through 233) On November 9, 1990 the jury returned a verdict in favor of all the Respondents on the claims presented by the Petitioner. The court entered a judgment for Respondents and also entered an "Order to Show Cause" requiring Petitioner to show cause why he should not be found responsible for Rule 11 Sanctions. (R 3-119) Prior to a hearing upon the Order to Show Cause, Petitioner filed with the Eleventh Circuit a Petition for Writ of Mandamus. Petitioner sought to stay the lower court proceedings and further asked the judge be disqualified or recused from presiding over the case. The Eleventh Circuit denied Petitioner's Petition for Writ of Mandamus on November, 19, 1990. (R 3-136)

On November 16, 1990 the trial court ordered sanctions from the bench and required Petitioner to pay Defendants courts costs and counsel fees. (R 3-135) On December 17, 1990 the trial court entered an Order stating that "[b]ased on the evidence adduced at the hearing and on the court's observations of the pleadings and of the trial, the court determined that this lawsuit was frivolous and vexatious from the beginning." (R 4-148) During the hearing the court stated why it had not previously disposed of the Petitioner's case by way of Motion to Dismiss or Motion for Summary Judgment.

> "Plaintiff contends that the Complaint must have had some merit because it withstood Defendant's Motion to Dismiss and Motions for Summary Judgment and because the court sent the case to the jury for deliberation on the merits rather than direct a verdict in favor of Defendants at the close of Plaintiff's case. The court, however, allowed the case to go to trial not because Plaintiff presented sufficient evidence to withstand the pretrial motions, but

because the court wanted to see whether Plaintiff could present any evidence at trial . . . Finally, Plaintiff has repeatedly accused the court of prejudice. As a result, the court sent the case to the jury not because of a perceived factual basis for the claim, but because it wanted Plaintiff to receive a jury verdict. Only then would Plaintiff know that the outcome of the case was based on the merits rather than on judicial bias." (R 4-148-3 and 4)

The court ordered Petitioner to pay sanctions and attorney's fees imposed jointly under Rule 11, Fed. R. Civ. P., and 42 U.S.C. §1988. Petitioner was ordered to pay $27,203.50 in attorney's fees to Defendant Frederick; $8,018.75 in attorney's fees to *The Orlando Times* Defendants; and $2,138.55 to be paid to the court to compensate for the administrative costs and expenses of the proceeding, particularly juror's fees. (R 4-148)

The Eleventh Circuit affirmed without opinion and denied Petitioner's Motion for Rehearing and Suggestion of Rehearing en banc.

REASONS FOR DENYING THE WRIT

POINT I

THERE DOES NOT EXIST A SHARP DIVISION IN THE CIRCUITS REGARDING WHETHER A CLAIM THAT HAS SURVIVED PRETRIAL DISMISSAL MOTIONS AND RECEIVED A FULL SCALE TRIAL CAN BE UNSUPPORTED IN FACT OR UNWARRANTED IN LAW WITHIN THE MEANING OF RULE 11.

This Court has held that the main objective of Rule 11 is not to reward parties who are victimized by litigation; it is to deter baseless filings and curb abuses. *Business Guides, Inc. v. Chromatic Comm.*, 498 U.S., ___ , 112 L.Ed.2d 1140, 1160, 111 S.Ct. 922 (1991).

Like the imposition of costs, attorney's fees, and contempt sanctions, a Rule 11 sanction is not a judgment on the action's merits, but simply requires the determination of a collateral issue, which may be made after the principal suit's termination. *Cooter & Gell v. Hartmarx Co.*, 496 U.S. 384 (1990). The time when sanctions are to be imposed rests on the discretion of the trail judge. However, it is anticipated that in the case of pleadings, the sanctions issue under Rule 11 normally will be determined at the end of the litigation. Fed. R. Civ. P. 11 Advisory Committee's Note.

The crux of the Petitioner's argument is that the Second, Fifth and Sixth Circuits have held that a claim surviving pretrial dismissal motions and receiving a full scale trial are not frivolous within the meaning of Rule 11. The Petitioner, however, fails to cite any case law from these circuits that makes such a broad declaration. Petitioner has relied on dicta to support his position and hence, has misstated the law. The Petitioner cites *Healey v. Chelsea Resources, Ltd.*, 947 Fed.2d 611 (2nd Cir. 1991) for the proposition that the denial of a summary judgment motion demonstrates that the claimant's testimony is not incredible or inadequate as a matter of law. The court in *Healey* made it very clear that:

> *While we do not mean to imply that an attorney automatically gains immunity from Rule 11 sanctions whenever he has successfully fended off a motion for summary judgment,* we cannot, in light of the pretrial record here, uphold the District Court's ruling that counsel should have known Healey's trial testimony would be deemed so incredible that his claims would be found frivolous. (emphasis added)

Id. at 626. *Healey* does not stand for the proposition that if a claim has survived a summary judgment motion absent fraud or other egregious misconduct, no sanctionable violations of Rule 11 can be imposed.

In *Mihalik v. Pro Arts, Inc.*, 851 F.2d 790, 794 (6th Cir. 1988), the Petitioner relies on the court's dicta rather than the court's holding to support his argument. ("If [plaintiff's] claims were so frivolous, we find it remarkable that the district court would allow the case to go to trial".) It is Hornbook law that dicta is not binding in subsequent cases as legal precedent and it certainly cannot rise to the level of creating a sharp division between the circuits. *See e.g., Anheuser-Busch, Inc. v. Stroh Brewery Co.*, 750 F.2d 631 (8th Cir. 1984) (Holding that the presence of a very brief statement in a case from another circuit made in an entirely different factual context should not be seen as establishing a rule of law.)

Petitioner has also cited the case of *National Association of Govt. Employees, Inc. v. National Federation of Fed. Employees*, 844 F.2d 216, 223 (5th Cir. 1988)[1] for

---

[1] The Petitioner claims that there exists a sharp division in the circuits regarding whether a claim that has survived pretrial dismissal motions and received a full scale trial can be unsupported in fact or unwarranted in law within the meaning of Rule 11. The Petitioner has cited *National Association of Govt. Employees v. National Federation of Fed. Employees*, 844 F.2d 216 (5th Cir. 1988) and *Mihalik v. Pro Arts*, 851 F.2d 790 (6th Cir. 1988) for the proposition that claims surviving through trial are not frivolous within the meaning of Rule 11. However, the Petitioner has also cited cases from the same circuits for the proposition that a claim's survival through trial bears no relation to the sanctions practice. *See e.g., Jennings v. Joshua Independent School District*, 877 F.2d 313. (5th Cir. 1989) *cert. den.*, 496

[footnote continued]

the proposition that Rule 11 sanctions are inappropriate where a court has denied a directed verdict and suggested settlement. The court actually held that since the filing of the original Complaint was not redundant, and that the Complaint was well grounded, there could be no basis for Rule 11 sanctions. *Id.* at 224. The Petitioner has mistaken the court's dictum in reference to 28 U.S.C. §1927 to mean that Rule 11 sanctions are inappropriate if a case has survived a motion for directed verdict.

Petitioner has also cited *Sullivan v. School Board of Pinellas County*, 773 F.2d 1182 (11th Cir. 1985) for the proposition that a claim surviving attack by pretrial motion and going to trial is not apt for Rule 11 sanctions absent special circumstances. In this instance, the Petitioner has completely misstated the holding in *Sullivan*. The court did not even make a single reference to Rule 11. The court instead was making reference to attorney's fees under Title VII.[2] Furthermore, *Sullivan* stated that

---

U.S. 935 (1990); *LeMaster v. United States*, 891 F.2d 115 (6th Cir. 1989) and *Mann v. G&G Mfg, Inc.*, 900 F.2d 953 (6th Cir. 1990) *cert. den. sub. nom. Sloan v. G&G Mfg., Inc.*, ___ U.S. ___ 112 L.Ed.2d 398, 111 S.Ct. 387 (1990). This shows that there does not exist a true conflict between the circuits, but rather that sanctions are best considered on a case by case basis.

[2]The standard for attorney's fees under Title VII is quite clear. "If plaintiff's case, viewed as a whole, was objectively 'frivolous, unreasonable, or without foundation', the court should award fees even though plaintiff survived motion to dismiss for failure to state a claim or for summary judgment." *Greenberg v. Hilton Int'l. Co.*, 870 F.2d 926, 940 (2d Cir. 1989), *vacated on other grounds*, 875 F.2d 39 (2d Cir. 1980). (quoting *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978)). "Cases that are ultimately viewed as frivolous may well survive motions to dismiss under a system of notice pleading that does not require factual detail and even motions for summary judgment in which the evidence may be presented in sketchy fashion and credibility may not

[footnote continued]

while it is an important factor in determining whether a claim is frivolous to look at whether the trial court dismissed the case prior to trial or held a full-blown trial on the merits, that was only a general guideline and not a hard and fast rule. Determinations regarding frivolity are to be made on a case by case basis. *Id.* at 1189.

In *Foster v. Mydas Associates, Inc.*, 943 F.2d 139, the court held that:

> "The circuits are in agreement that where fees are sought by a prevailing defendant against an unsuccessful plaintiff in a civil rights case, one relevant factor will often be whether the plaintiff succeeded in making out a prima facie case – a circumstance which may well prompt a reviewing tribunal to ask whether the plaintiff's case withstood summary judgment and/or directed verdict motions. But that factor, standing alone, is not entitled to decretory significance."

Id. at 144. *See also, Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 606 (1st Cir. 1988) (summary judgment standard and Rule 11 standard are not necessarily or inevitably congruent); *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, 1473 (2d Cir. 1988), *rev'd*

---

be taken into account. Indeed, in analogous circumstances, we have affirmed an award of fees to defendants in cases that were sufficient to go to the jury." *Id.* at 940. Numerous other circuits have awarded sanctions to prevailing defendants in Title VII cases despite the fact that plaintiffs were allowed to present their cases. *See e.g., Lewis v. Brown & Root, Inc.*, 711 F.2d 1287 (5th Cir. 1983) *cert. den.* 467 U.S. 1231 (1984); *Coleman v. General Motors Corp.*, 667 F.2d 704 (8th Cir. 1981). The Standard for §1988 claims is also very clear. *See e.g., Brown v. Borough of Chambersburg*, 903 F.2d 274, 279 (3rd Cir. 1990 (The denial of a motion for a directed verdict has not, as a matter of law, foreclosed consideration of a defendant's later request for fees based on the frivolousness of the claim.)

on other grounds sub nom. Pavelic v. LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989) (it is entirely possible that a baseless factual claim will survive a motion for summary judgment); *Barrios v. Pelham Marine, Inc.*, 796 F.2d 128, 132 (5th Cir. 1986) (holding that Rule 11 sanctions are appropriate despite the fact that claim survived a motion for summary judgment.); *LeMaster v. U.S.*, 891 F.2d 115, 121 (6th Cir. 1989) (*all courts* addressing this issue have concluded that mere survival of a summary judgment motion, in which all facts are construed in the non-movant's favor, does not insulate a party from sanctions if it is later determined that all factual claims were groundless. (emphasis added)); *Mann v. G&G Mfg., Inc.*, 900 F.2d 953, 961 (6th Cir. 1990) *cert. den. sub. nom. Sloan v. G&G Mfg., Inc.*, ___ U.S. ___ 112 L.Ed.2d 398, 111 S.Ct. 387 (1990) (given the significant differences between a motion for summary judgment and a Rule 11 motion, it is not surprising that a district court's ruling on a Rule 56 motion for summary need not determine the outcome of the district court's ruling on a Rule 11 motion for sanctions.)

The Petitioner has demonstrated no true, acknowledged conflict between any of the decisions cited and the ruling of the Eleventh Circuit in this case.

POINT II

THERE DOES NOT EXIST A SHARP DIVISION IN THE CIRCUITS REGARDING WHETHER TO ADOPT THE "LEAST SEVERE SANCTION" TEST FOR REVIEWING RULE 11 SANCTIONS.

The circuits are not in sharp conflict regarding whether to adopt the "lease severe sanction" test for reviewing Rule 11 sanctions.

The basis of the Petitioner's second argument is that under the "least severe sanction" standard, courts invoking Rule 11 may impose only the least severe sanction adequate to serve the purposes of the rule. The Petitioner, however, fails to cite any case law that makes such a statement. Rather, the cases cited by the Petitioner hold that the sanction imposed *should* be the least severe sanction adequate to the purpose of Rule 11. *See, e.g., Thomas v. Capital Security Serv., Inc.*, 836 F.2d 866, 878 (5th Cir. 1988) (*en banc*) (emphasis added).

The circuit courts have unanimously emphasized the discretion of the district courts to impose an appropriate sanction. A district court may impose sanctions once a violation of Rule 11 is found, but the district court retains broad discretion in determining the "appropriate" sanction under the rule. *Thomas* at 878.

Furthermore, the remaining circuits, including the Eleventh Circuit, have consistently focused primarily on the deterrent purpose of Rule 11, asking what sanction will discourage future frivolous litigation and poor lawyering practices without punishing the offending party or counsel beyond the point of adequate deterrence. *See e.g., Langer v. Monarch Life Insurance Co.*, 966 F.2d 786 (3rd Cir. 1992) (agreeing with the Fifth Circuit that whatever the ultimate sanction imposed, the district court should utlize the least severe sanction that furthers the purposes of Rule 11). *See also Oliveri v. Thompson*, 803 F.2d 1265, 1281 (2d Cir. 1986) *cert. den. sub. nom. Suffolk County v. Graseck*, 980 U.S. 918 (1987) (holding that it lies well within the district court's discretion to temper the amount to be awarded against an offend-

ing attorney by a balancing consideration of his ability to pay).[3]

The case cited by the Petitioner to demonstrate a conflict in the Eleventh Circuit is inapplicable. In *Avirgan v. Hull*, 932 F.2d 1572 (11th Cir. 1991), *cert. den.*, ___ U.S., 116 L.Ed.2d 813, 112 S.Ct. 913 (1992), the court affirmed more than a million dollars in sanctions based upon the bad faith exception to 28 U.S.C. §1927 and Federal Rule of Civil Procedure 11. *Id.* at 1582. Petitioner has misstated the holding in *Avirgan* because the sanction award was not based primarily on Rule 11.

Both the instant case and prior Eleventh Circuit decisions have focused primarily on reasonable sanctions to deter abuse without punishing the offending party or counsel beyond the point of adequate deterrence. *See e.g., Norton Tire Co., Inc. v. Tire Kingdom Co., Inc.*, 858 F.2d 1533, 1536 (11th Cir. 1988) (holding that although binding precedent plainly foreclosed plaintiff's antitrust claim, the trial judge did not abuse his discretion by refusing to impose Rule 11 sanctions.); *Roleston v. Eldridge*, 848 F.2d 163, 165-66 (11th Cir. 1988) (holding that refusal to impose sanctions under Rule 11 against civil rights plaintiff who should have known that his federal civil rights complaint lacked merit was not an abuse of discretion.). Petitioner has demonstrated no true, acknowledged conflict between any of the decisions cited and the ruling of the Eleventh Circuit in this case.

---

[3]The court was making reference to both Rule 11 and 28 U.S.C. §1927.

POINT III

THERE DOES NOT EXIST A SHARP CONFLICT BETWEEN THE CIRCUITS REGARDING WHETHER THE COLLATERAL COSTS OF JUDICIAL ADMINISTRATION, SUCH AS JUROR'S FEES, MAY BE AWARDED AS A RULE 11 SANCTION.

The cases cited by the Petitioner to demonstrate conflict are inapplicable. The Petitioner has cited *Blue v. Dept. of the Army*, 914 F.2d 525, 548 (4th Cir. 1990), *cert. den. sub. nom.*, and *Chambers v. United States Dept. of the Army*, ___ U.S. ___ 113 L.Ed.2d 645, 111 S.Ct. 1580 (1991), for the proposition that judicial and support staff salaries could not be shifted to either counsel or to a party as a Rule 11 sanction. The case is inapplicable because sanctions were awarded based upon Rules 11 and 16 of the Federal Rules of Civil Procedure, the "bad faith" exception to the American rule, and 28 U.S.C. §1927. Furthermore, the sanctions dealing with court costs utilized 28 U.S.C. §1920.

In *Blue*, the court stated, "we do not hold that it is never appropriate for a district court to assess against a party nominal court expenses not provided for in 28 U.S.C. §1920 . . . However, [because of the] magnitude [of the sanctions] we therefore set aside the sanctions for court salaries, leaving intact the imposition of court costs for the expenses of the clerk of the court and the court reporter which are authorized under 28 U.S.C. §1920." *Id.* at 548. The other two cases mentioned by the Petitioner, *White v. Raymark Indus.*, 783 F.2d 1175 (4th Cir. 1986) and *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987) are both inapplicable because they do not even mention Rule 11.

The circuits are in agreement that in certain circumstances it may be appropriate for a district judge to

impose Rule 11 sanctions in the form of a fine and that the district judge is free to fine an attorney for the court's time, but that fine must be based on court costs and paid to the clerk's office. *See Eisenberg v. University of New Mexico*, 936 F.2d 1131, 1136 (10th Cir. 1991).

Once again the Petitioner has failed to demonstrate a true conflict between any of the decisions cited and the ruling of the Eleventh Circuit in this case. There is nothing to support the Petitioner's argument that court costs may not be awarded as a Rule 11 sanction.

POINT IV

THE CURRENT CONFLICT REGARDING WHETHER 28 U.S.C. R 455(a) MANDATES THAT THE CAUSE OF APPARENT PARTIALITY OR BIAS MUST STEM FROM AN EXTRAJUDICIAL SOURCE IS NOT APPLICABLE TO THE CASE AT BAR.

Finally, the Petitioner has demonstrated a true acknowledged conflict between the circuits. The circuits are in conflict regarding whether 28 U.S.C. § 445(a) requires that the cause of apparent partiality or bias must stem from an extrajudicial source. *See e.g., Waller v. United States*, ___ U.S. ___ 119 L.Ed.2d 239, 112 S.Ct. 2321 (1992) (White and O'Conner, J.J., dissenting from denial of certiorari because of conflict on this issue).

The First Circuit has held that the source of the asserted bias/prejudice in a 28 U.S.C. §455(a) claim can originate explicitly in judicial proceedings. *United States v. Chantal*, 902 F.2d 1018, 1022 (1st Cir. 1990). *See also, Panzardi-Alvarez v. United States*, 879 F.2d 975, 983-984 (1st Cir. 1989) *cert. den.* 493 U.S. 1082 (1990); *United States v. Kelly*, 712 F.2d 884, 889-890 (1st Cir. 1983); *United States v. Cepeda Penes*, 577 F.2d 754,

758 (1st Cir. 1978); *United States v. Cowden*, 545 F.2d 257, 265 (1st Cir. 1976), *cert. den.*, 430 U.S. 909 (1977).

Other circuits have explicitly rejected the First Circuit's approach to 28 U.S.C. §455(a). *See e.g., United States v. Mitchell*, 886 F.2d 667, 671 (4th Cir. 1989) (holding that "the alleged bias must derive from an extrajudicial source. It must result in an opinion on the merits on a basis other than that learned by the judge from his participation in the matter.") (quoting *In re Beard*, 811 F.2d 818, 827 (4th Cir. 1987))

Although the Petitioner has brought up the issue of the district judge's recusal practice, the Petitioner has never brought up the issue of whether the source of the district judge's bias stemmed from an extrajudicial source. Neither the district court nor the court of appeals addressed this question directly. There is no mention of the alleged bias stemming from an extrajudicial source in the opinion of either the trial court or the ruling of the court of appeals. *See, Searle & Co. v. Cohn*, 455 U.S. 404, 414 (1982) (reasoning that it is unwise to pass upon the constitutionality of an issue in light of the fact that the lower courts in the case did not address the issue.).

Furthermore, this Court has already had an opportunity to rule on bias and an extrajudicial source with reference to 28 U.S.C. §144. *See, United States v. Grinnel Corp.*, 384 U.S. 563, 583 (1966) (holding that the alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the Judge learned from his participation in the case.)

In addition, the recusal practice of the district judge in this case does not conflict with any decisions of this

court. *See e.g., Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 821 (1986) (stating that only in the most extreme cases would disqualification of a judge on the basis of general bias or prejudice be required in a civil case.) There is nothing to support the Petitioner's argument that the recusal practices of the district judge conflicted with decisions of this court.

CONCLUSION

The Petitioner has demonstrated no true, acknowledged conflict between any of the decisions cited and the ruling of the Eleventh Circuit in this case in regards to the first three issues. As far as the fourth issue is concerned, the current conflict between the circuits is not applicable to the case at bar. For these reasons, the Petition for Writ of Certiorari to review the ruling of the United States Court of Appeals for the Eleventh Circuit should be denied.

Respectfully submitted,

JEFFREY G. SLATER
Fla Bar No. 0324345
EUBANKS, HILYARD, RUMBLEY
MEIER & LENGAUER, P.A.
P.O. Box 4973
Orlando, Florida 32802
(407) 425-4251
Attorneys for Respondent,
BILL FREDERICK.

September 9, 1992

Supreme Court, U.S.
FILED
OCT 2 1992
OFFICE OF THE CLERK

No. 92-79

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GABE KAIMOWITZ,

Petitioner,

—v.—

BILL FREDERICK, THE *ORLANDO TIMES*, DR. CALVIN COLLINS, LOTTIE COLLINS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF AND SUPPLEMENTAL BRIEF

MORTON STAVIS
GEORGE COCHRAN
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, Seventh Floor
New York, New York 10012
(212) 614-6427

JEFFREY W. STEMPEL
BROOKLYN LAW SCHOOL
250 Joralemon Street
Brooklyn, New York 11201
(718) 780-7953

Counsel of Record

BEST AVAILABLE COPY

TABLE OF CONTENTS

Table of Authorities ii

Introduction 1

ARGUMENT:

I. RESPONDENT'S ARGUMENTATIVE COUNTER-STATEMENT OF FACTS ATTEMPTS TO MISCAST THE NATURE OF PETITIONER'S ACTION BELOW WHILE ALSO TWISTING PETITIONER'S ASSESSMENT OF THE CONFLICT IN CIRCUITS REGARDING RULE 11 AND SECTION 1988 SANCTIONS PRACTICE 2

II. THE THIRD CIRCUIT'S RECENT DECISION IN HAINES v. LIGGETT GROUP, INC. ACCENTUATES THE CONFLICT IN THE CIRCUITS REGARDING APPROPRIATE PRACTICE AND STANDARDS GOVERNING JUDICIAL DISQUALIFICATION . . . 5

CONCLUSION 8

TABLE OF AUTHORITIES

STATUTES:

28 U.S.C. §1254 2

28 U.S.C. §1927 5

RULES:

Fed. R. Civ. P. 11 2,3,4

CASES:

Avirgan v. Hull,
932 F.2d 1572 (11th Cir. 1991),
cert. denied sub. nom.
Christic Institute v. Hull, ___ U.S. ___,
112 S.Ct. 913, 116 L.Ed.2d 813 (1992) . 5

Berger v. United States,
255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481
(1921) 7

Calloway v. Marvel Entertainment Group,
854 F.2d 1452 (2d. Cir. 1988), rev'd sub.
nom. on other grounds, Pavelic &
LeFlore v. Marvel Entertainment Group,
493 U.S. 120, 110 S.Ct. 456,
107 L.Ed.2d 438 (1989) 4

Cipollone v. Liggett Group, Inc., ___ U.S.
__,112 S. Ct. 2608, 120 L.Ed.2d 407
(1992) 6

Foster v. Mydas Associates, Inc.,
943 F.2d 139 (1st Cir. 1991) 5

Haines v. Liggett Group, Inc., ___ F.2d _
1992 U.S. App. Lexis 21069 (3d Cir. Sept.

4, 1992) 5,6

Healey v. Chelsea Resources, Ltd.,
947 F.2d 611 (2d Cir. 1991) 4

LeMaster v. United States,
891 F.2d 115 (6th Cir. 1989) 5

Lebovitz v. Miller,
856 F.2d 902 (7th Cir. 1988) 4

Mihalik v. Pro Arts, Inc.,
851 F.2d 790 (6th Cir. 1988) 5

Waller v. United States, ___ U.S. ___,
112 S. Ct. 2321, 119 L. Ed. 2d 239
(1992) 6

MISCELLANEOUS:

Charles Strum, "Ruling in Tobacco Case Tests Boundaries of Judicial Bias," The New York Times p. 46 , col. 1 (Sept. 20, 1992) 7

No. 92-79

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

GABE KAIMOWITZ, Petitioner,

v.

BILL FREDERICK, THE ORLANDO TIMES,
DR. CALVIN COLLINS,LOTTIE COLLINS, Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY BRIEF AND SUPPLEMENTAL BRIEF

INTRODUCTION

Petitioner Gabe Kaimowitz submits this brief to address new matter raised by Respondent[1] and to note an important Court

[1] Petitioner also notes that due to a typographical error the Petition misstated the basis for invoking this Court's jurisdiction. Petitioner of course seeks review by writ of certiorari pursuant to 28 U.S.C. §1254(1) and not review of a certified question under 28 U.S.C. §1254(2).

of Appeals case decided since the filing of the pending Petition.

I.

RESPONDENT'S ARGUMENTATIVE COUNTER-STATEMENT OF FACTS ATTEMPTS TO MISCAST THE NATURE OF PETITIONER'S ACTION BELOW WHILE ALSO TWISTING PETITIONER'S ASSESSMENT OF THE CONFLICT IN CIRCUITS REGARDING RULE 11 AND SECTION 1988 SANCTIONS PRACTICE.

In an effort to divert the Court's attention from the conflict in the circuits, Respondent Bill Frederick[2] engages in an extensive counterstatement of the facts. As a result, Petitioner is mischaracterized as merely a disgruntled former employee striking back through a frivolous action. In fact, Petitioner's discharge was a relatively minor aspect of his claim that survived six motions for pre-verdict dismissal.[3]

Petitioner was dismissed from the Orlando Times in March 1987 and did not bring suit until 23 months later, when he found the Times refusing to accept his advertisements or the submissions of his clients and other black citizens of Orlando

---

[2] Respondents Dr. Calvin Collins and Lottie Collins and The Orlando Times (the "newspaper defendants") elected not to submit a brief in opposition.

[3] Respondent does not contest that Petitioner in fact prevailed at trial to some extent when the jury found for him on the counterclaim brought by the newspaper defendants and that, notwithstanding their mixed record of success, the newspaper defendants were awarded a sanction equivalent to substantially all their counsel fees.

critical of the Mayor.[4] Respondent Frederick was at that time writing a column in the Times, a weekly targeted to black readers. This was particularly troubling since Petitioner was then representing black clients in a pending civil rights action filed in October 1988 against the City and Respondent.

Based on this suspicious pattern of circumstances and a November 1988 meeting between Respondent and the newspaper defendants, Petitioner believed there was concerted action by defendants against him and his clients.[5] Although the jury declined to make this inference, the facts underlying Petitioner's claim were apparent when the trial court denied Respondents' motion to dismiss, four summary judgment motions, and a directed verdict motion attacking Petitioner's conspiracy claim. Presumably, an inference so implausible as to be frivolous would not support six denials of preverdict dismissal and could thus not be sanctioned under Rule 11.

Respondent fails to contest this simple logic but instead quibbles with Petitioner's characterization of the degree of disarray in the Circuits regarding Rule 11. Respondent in essence argues that the conflict regarding determination and

---

[4] Petitioner found the newspaper's behavior suspicious both because it was a black-owned newspaper with the avowed purpose of serving Orlando's black community and because the newspaper ordinarily published all news releases or similar announcements submitted to it by community groups or interested persons.

[5] See Lebovitz v. Miller, 856 F.2d 902, 905-07 (7th Cir. 1988) (denying sanctions and noting difficulty in assessing matters of circumstantial evidence and alleged conspiracy).

imposition of Rule 11 sanctions is not sufficiently express and formal but ironically attempts to prove this point by citing judicial inconsistency in the application of Rule 11. Respondent's brief only illustrates that the appellate courts are in both inter-circuit and intra-circuit discord[6] and that

---

[6] See Resp. Brief at 10. It cannot be denied that some circuits, particularly the Second, have resisted Rule 11 sanctions when a matter has gone to trial unless there is evidence of affirmative misconduct by the sanctioned party that prevented the court from seeing the weakness of a claim at the pretrial stage. See, e.g., Healey v. Chelsea Resources, Ltd., 947 F.2d 611 (2d Cir. 1991)(sanctions reversed); Calloway v. Marvel Entertainment Group, 854 F.2d 1452 (2d. Cir. 1988), rev'd sub. nom. on other grounds Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989)(sanctions imposed where summary judgment defeated by possibly false affidavit). Other circuits, such as the First and Fifth, appear not to be influenced by a claim's pretrial success when adjudicating post hoc Rule 11 issues (see Pet. Brief at 10-11). The Sixth Circuit varies distinctly from panel to panel. Compare Mihalik v. Pro Arts, Inc., 851 F.2d 790, 794 (6th Cir. 1988)("remarkable" that case withstanding summary judgment could be sanctionable) with LeMaster v. United States, 891 F.2d 115 (6th Cir. 1989)(denial of summary judgment completely irrelevant to Rule 11 inquiry). Respondent's excerpt from Foster v. Mydas Assoc., Inc., 943 F.2d 139, 144 (1st Cir. 1991)(Resp. Brief at 12) might mislead a reader into believing that at least one panel surveyed the case law and found uniformity. Unfortunately, Respondent has misquoted the relevant portion of the Foster opinion by adding words not written by the First Circuit. Respondent also misconstrues Avirgan v. Hull, 932 F.2d 1572 (11th Cir. 1991) cert. denied, __ U.S. __, 112 S.Ct. 913, 116 L.Ed.2d 813 (1992)

erratic and unwise application of Rule 11 calls for an exercise of this Court's supervisory power.[7] Furthermore, Petitioner does not contend that some circuits have made denial of pretrial dismissal motions a per se bar to sanctions. Rather, Petitioner notes that some courts have adopted at least a de facto presumption against sanctions in such cases while other courts treat this factor as having little or no importance.

II.

THE THIRD CIRCUIT'S RECENT DECISION IN HAINES V. LIGGETT GROUP, INC. ACCENTUATES THE CONFLICT IN THE CIRCUITS REGARDING APPROPRIATE PRACTICE AND STANDARDS GOVERNING JUDICIAL DISQUALIFICATION.

On September 4, the conflict in the circuits regarding recusal practice (see Pet. Brief at 16-18) was exacerbated by the Third Circuit's decision in Haines v. Liggett Group, Inc., __ F.2d ___, 1992 U.S. App. Lexis 21067 (3d Cir. 1992). In Haines, the court removed the trial judge from a case against several tobacco companies and affiliated defendants similar to the situation and allegations confronted by this Court in Cipollone v. Liggett Group, Inc., __ U.S. __, 112 S.Ct. 2608,

---

as "not based primarily on Rule 11" when in fact the court found both Rule 11 and 28 U.S.C. §1927 equally applicable to the sanctioned attorney and law firm. See 932 F.2d at 1582.

[7] Regarding the status of the "least severe sanction" approach, Respondents are simply incorrect in failing to see a virtual bright line separating courts that have adopted the doctrine from those that reject or ignore it (see Pet. Brief at 13-15).

120 L.Ed.2d 407 (1992). Judge H. Lee Sarokin, who had presided over the lengthy and ongoing Cipollone litigation and similar tobacco lawsuits, wrote in the course of deciding a discovery dispute related to claims of privilege that the cigarette industry "may be the king of concealment and disinformation" and that other purported corporate villains were merely "rising pretenders."

Although Judge Sarokin's language may have been intemperate, it undoubtedly sprang from information he acquired in the performance of his judicial duties and conclusions he drew from the act of judging. Nonetheless, he was removed from the case because the Appeals Court feared that third parties reading the opinion would conclude that Judge Sarokin could not impartially preside over the remainder of the cigarette litigation. In Haines, the Third Circuit squarely aligned itself with the First Circuit in concluding that even bias acquired through judicial activity may require recusal. In contrast, five other circuits (including the Eleventh) hold that disqualifying bias must be extrajudicial unless it is so pervasive as to make the trial unfair. See Waller v. United States, __ U.S. __, 112 S.Ct. 2321, 119 L.Ed.2d 239 (1992)(White and O'Connor, JJ., dissenting from denial of certiorari); Pet. Brief at 15-18. Furthermore, the public attention and press coverage devoted to the cigarette lawsuits and Judge Sarokin's removal have made this one of those rare instances where division of the circuits has come to the attention of the public at large. See, e.g., Charles Strum, "Ruling in Tobacco Case Tests Boundaries of Judicial Bias," The New York Times p. 46, col. 1 (September 20, 1992).

Respondent acknowledges that this conflict of circuits exists but attempts to minimize it by suggesting it was not argued below (Resp. Brief at 18). In fact, Petitioner raised as grounds for recusal extrajudicial acts of the trial judge (membership in

a restrictive club discriminating against blacks and Jews). This line of inquiry was not, however, addressed by the trial judge, who summarily denied Petitioner's disqualification motion. Yet in earlier and subsequent matters involving Petitioner as counsel (rather than as a party as he is in this case), the trial judge recused himself, on one occasion stating that he did so because of bias against Petitioner for his "unprofessional conduct," a criticism that is arguably either judicially acquired or extrajudicial bias depending on how the judge came to see Petitioner as unprofessional.[8] Neither the Eleventh Circuit nor the trial judge explained its assessment of the disqualification issue (other than the trial court's attempt to excuse its failure to dismiss a claim subsequently characterized as frivolous; see Pet. Brief at 7a).

Respondent attempts to invoke this brusque silence to persuade this Court to allow continued festering of an inter-circuit conflict, inconsistency sure to discourage vigorous advocacy, and grave unfairness to Petitioner. Fairly read, the record in this case shows Petitioner raising serious disqualification issues that involve the acknowledged conflict among the courts regarding recusal and that an admittedly biased trial judge imposed more than $38,000 in sanctions against Petitioner. These circumstances make the instant case one appropriate for the Court's involvement both to resolve inter-circuit discord and to supervise lower court application

---

[8] In addition, Petitioner argues that the depth of the trial court's enmity toward him requires recusal whatever the source of bias. See Berger v. United States, 255 U.S. 22 (1921). However, if the Eleventh Circuit employed the broader recusal approach of the First and Third Circuits, Petitioner's burden in obtaining disqualification would be lightened considerably.

of a rule with potential for grave misuse in the hands of biased judges.

CONCLUSION

For the reasons set forth in his Petition and this supplementary and responsive brief, Petitioner seeks review of this important case.

Respectfully submitted,

MORTON STAVIS
GEORGE COCHRAN
Center for Constitutional Rights
666 Broadway, 7th Fl.
New York, NY 10012
(212) 614-6427

JEFFREY W. STEMPEL
Brooklyn Law School
250 Joralemon Street
Brooklyn, NY 11201
(718) 780-7953

Counsel of Record

October 2, 1992